In the Supreme Court of the United States
October Term, 1978

No. 78-174

M. W. ZACK METAL COMPANY, Petitioner,

v.

SS SEVERN RIVER, JANSEN & CO.,
CONTAM LINIE, and HANS H. JANSEN, respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

APPENDICES B and E

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APPENDIX B

DECISION OF OCTOBER 19, 1976, DENYING MOTION

Not for Publication

UNITED STATES DISTRICT COUR
DISTRICT OF NEW JERSEY

M. W. ZACK METAL COMPANY,)

Libellant,)

v.

THE SS SEVERN RIVER, JANSEN & CO.,)
CONTAM LINIE and HANS H. JANSEN,) Civil Action
) No. 386-61
Respondents.
) OPINION

Appearances:

Mr. Charles P. Saling
Attorney for libellant
By: Mr. Anthony B. Cataldo (New York bar)

Messrs: Lum, Biunno & Tompkins
Attorneys for respondents
By: Mr. David A. Birch

COOLAHAN, Senior Judge

This matter comes before the court on a motion by plaintiff, M.W. Zack Metal Company, to vacate an order of dismissal entered in the instant admiralty action[1] and to permit an

[1] Pursuant to Fed. R. Civ. P. 60(b)(5).

amendment of its complaint substituting[2] a party against whom the claim is asserted.[3]

In 1960 International Navigation corporation chartered its vessel SS Severn River to Contam Linie (the charterer), a German Partnership (including Jansen & Co. and Hans H. Jansen), for a voyage from Antwerp, Belgium, to the port of New York. The charterer solicited cargo to be transported on Board the Severn River, and Zack shipped with the Charterer 93 coils of hot rolled steel for which a clean bill of lading was issued but which were found to be damaged when they were discharged in Jersey City in February, 1960.[4]

A libel was filind in this court on May 12, 1961,[5] by Zack against the SS Severn River, Contam Linie, Jansen & Co., and Hans H. Jansen for the damaged cargo. The action was

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[2]Plaintiff seeks to substitute the owner of a vessel as a named defendant in place of the vessel itself.

[3]Pursuant to Fed. R. Civ. P. 15(a), 15(c).

[4]PURSUANT TO 46 U.S.C. § 740, which provides the federal courts with admiralty and maritime jurisdiction, and 46 U.S.C. §§ 1300, et seq., pertaining to bills of lading in conjunction with the carriage of goods by sea in foreign trade, to or from ports of the United States.

[5]The Court notes at this time the history of litigation concerning these parties in various courts of law. Zack Metal Company instituted a suit alleging the same cause of action as herein in the Southern District of New York on February 11, 1961, which was subsequently dismissed for lack of prosecution. In May, 1961, it instituted a

DECISION OF OCTOBER 19, 1976, DENYING MOTION

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5 a suit in a court in Hamburg, Germany, where the charterer resided, against the charterer, the individual partners of the charterer, and International Navigation Corporation. In 1966 that court found the charterer and its partners liable for the damage to Zack's steel, but Zack's claim against International was postponed for later decision. In 1971 the German court rendered a decision against International. All parties, including Zack, appealed to a higher German court. In 1972, while the appeal was pending, Zack commenced suit in the Eastern District of Virginia and caused an attachment to issue against another vessel owned by international. The District Court dismissed the action and the Court of Appeals for the Fourth Circuit affirmed. M.W. Zack Metal Co. v. International Navigation Corp., 510 F.2d 451 (4th Cir. 1975). The court held that the trial court judgment in Germany was an in rem judgment against the SS Severn River which furnished no basis for the assertion of in personam liability on the owner, or the attachment of another vessel owned by International

Also in 1975, the Hanseatic Provincial Court of Appeals in Germany dismissed the action with respect to International and affirmed the judgments against the other defendant, but in reduced amounts. Plaintiff petitioned the Supreme Court for review of the Fourth Circuit holding on the ground that the Circuit Court had lost jurisdiction to interpret the 1971 German judgment when the German Appeals Court reversed and dismissed the action with respect to International. Certiorari was, however, denied. 422 U.S. 1010 (1975).

OPINION OF OCTOBER 19, 1976

dismissed administratively on March 6, 1964, for lack of prosecuiton, pursuant to General Rule 12, the predecessor to General Rule 30. Upon Zack's application, an order was entered on March 12, 1965, restoring the case to the court's docket for the purpose of arresting the SS Severn River. A monition was issued on that date, but was returned unserved. A second order dismissing the suit administratively for lack of prosecution pursuant to General Rule 12 was then entered on March 24, 1965, without prejudice to the right of plaintiff to reopen the proceedings for good cause shown. Plaintiff seeks to vacate the March 24, 1965, order of dismissal and to amend its complaint.

Fed. R. Civ. P. 60(b)(5) provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ...(5)... it is no longer equitable that the judgment should have prospective application."

Relief under 60(b) is a matter addressed to the discretion of the court. Torockio v. Chamberlain Mfg. Co., 56 F.R.D. 82 (W.D. Pa. 1972), affirmed without opinion, 474 F.2d 1340 (3d Cir. 1973); Wagner v. Pennsylvania R.R. Co., 282 F.2d 157 (3d Cir. 1959); Toozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951). Plaintiff requests the Court to exercise its discretion and restore this case to the docket so that it might have an adjucation on the merits of its claim for damage with respect to International Naviga-

gation Corporation. Plaintiff suggests that laches is the only element appropriate for consideration when examining the issue whether the case should be restored, and that since it has been "diligently" prosecuting its claim in Germany, restoration should be permitted.

International argues against restoration on the basis that the March 24, 1965, order of dismissal has no prospective effect and therefore the discretionary relief afforded by Rule 60(b)(5) is unavailable. It further contends that restoration of the instant proceeding would be an abuse of the Court's discretion since plaintiff "now having lost, on appeal, its first bite of the apple, ... seeks, by reopening this suit, to take a second bite."[6]

It is unnecessary for the Court to reach the merits of the conflicting positions as to whether it should in the exercise of its discretion vacate its previous order. Plaintiff's exclusive purposed in bringing this motion is to receive an adjudication on its claim for damage with respect to International. If Zack is precluded from substituting International for the SS Severn River (destroyed in 1969), restoration becomes meaningless. A determination whether the complaint may properly be amended is thus in a practical sense dispositive of the restoration issue.

Plaintiff seeks leave of the Court to amend its libel by substituting International Navigation Corporation of Monrovia, Liberia, as owner of the SS Severn River, in place of the SS Severn River as a party defendant. The issue for the Court's determination is whether the complaint may now be amended so as to assert the claim therein against the vessel's owner without violating the rule expressed in Fed. R.

[6]Memorandum of law on behalf of International Navigation Corporation in opposition to plaintiff's motion to vacate dismissal and amend complaint, p.3

Civ. P. 15(c) against adding new parties to an action after the expiration of the statute of limitations.

The first paragraph of Rule 15(c) provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has recieved such notice of the institution of the action that he will not be prejudiced in maintaining a defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added.)

This action is brought before the Court pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300, et seq., which contains its own limitations period. 46 U.S.C. § 1303(6) states in part:

> "In any event, the carrier and the ship shall be discharged from all liability in respect to loss or damage unless suit is brought within one year after delivery of the goods or the date when goods should have been delivered."

Thus, for purposes of examining whether the

facts of the instant suit are sufficient to bring this motion within the requirements of Fed. R. Civ. P. 15(c), the Cogsa one-year limitation period will be applied.

Suit herein was commenced in 1961 against the SS Severn River, and also against the charterers, Jansen and Co., Contam Linie, and Hans H. Jansen. Plaintiff now seeks by way of amendment to substitute an in personam claim against International Navigation Corporation as owner of the SS Severn River for the initial in rem claim against the vessel itself. Plaintiff contends that it is entitled to such an amendment as a matter of course. While the thrust of Rule 15 as a whole is to allow the liberal use of amendments to implement the important federal policy of encouraging litigation on the merits,[7] Rule 15(c) imposes the necessary restrictions in deference to the equally important premises of the statute of limitations,[8] with which relation back is in the terms of the Federal Rules Advisory Committee "intimately connected."[9] Rule 15(c) determines whether an amendment that changes parties after the expiration of the statute of limitations relates back to the time of filing of the original complaint. "It should be read together with the general provision in Rule 15(a) that leave to amend should be freely given when justice so requires." Yordan v. Flaste, 374 F. Supp. 516, 518-19 (D. Del. 1974).

Although courts do not agree on whether the terminology "changing the party" found in Rule 15(c) encompasses the addition or substitution of parties, this court will assume that

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[7] Conley v. Gibson, 355 U.S. 41, 48 (1957).

[8] 57 Minn. L. Rev. 83, 87 (1972).

[9] Fed. R. Civ. P. 15(c) Advisory Committee's Note.

addition or substitution is possible and will proceed to test the plaintiff's proposed amendment against the explicit requirements of Rule 15(c). Those courts which prohibit joinder of new parties (see People of Living God v. Star Towing Co., 289 F. Supp. 635 (E.D. La. 1968)) apply a restrictive construction to the Rule 15(c) reference to an amendment changing a party. The Advisory Committee's Note, however, seems to reject this restrictive constuction. The stated purpose of Rule 15(c) is to clarify when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or a misdescription of a defendant) shall relate back to the date of the original pleading. Fed. R. Civ. P. 15(c) Advisory Committee's Note, 39 F.R.D. at 82. Proper interpretation of the phrase "changing the party" should therefore include the addition and substitution of a party as well as misnomer situations.

Rule 15(c) provides three conditions which must be satisfied in order for an amendment changing a party to relate back: (1) the claim asserted in the amended pleading must arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading; (2) the party to be brought in by amendment must have, within the period provided by law for commencing the action against him, received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (3) the party to be brought in must or should, within the period of time provided by law for commencing the action against him, have known that but for a mistake concerning the identity of the proper party the action would have been brought against him.

Since plaintiff seeks only to substitute a defendant against whom its claim is asserted

the first condition of Rule 15(c) is clearly satisfied. The second condition, however, does not seem to have been met. For plaintiff to satisfy that condition, it must make a two-fold showing: (a) that International Navigation Corporation had notice of the institution of this action[10] before the statute of limitations had run, and (b) that such notice was sufficient to prevent International from being prejudiced in maintaining its defense on the merits. Without reaching the question of prejudice, there is nothing in the record to indicate that International received even informal notice of the institution of this lawsuit prior to the attempted arrest of the SS Severn River in March, 1965, several years after the Cogsa one-year limitation period had expired.

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[10]Although the Advisory Committee suggested that purpose of the 1966 amendment to Rule 15 was the clarification of those instances in which relation back was appropriate, there still exist certain uncertainties in Rule 15(c) as amended. The uncertainty stems from the construction given to the language of the rule itself. (See discussion "changing the party.") Possible conflict exists with respect to how the phrase "notice of the institution of the action" should be construed. Two Courts of Appeals have expressly held that this language means notice of a lawsuit and not merely notice of the incident which led to the suit. Craig v. United States, 413 F.2d 854 (9th Cir.), cert. den., 396 U.S. 987 (1969); Archuleta v. Duffy's, Inc., 471 F.2d 33 (10th Cir. 1973). Within the Third Circuit, two District Courts have affirmed the position adopted in Craig. Slack v. Treadway Inn of Lake Harmony, Inc., 388 F. Supp. 15 (M.D. Pa. 1974); Francis v. Pan American Trinidad Oil Co., 392 F. Supp. 1252 (D. Del. 1975). This court also adopts the position announced in Craig. The notice requirement applicable to plaintiff's motion is thus notice of the commencement of the instant suit.

Regardless of whether plaintiff can surmount the second condition of Rule 15(c), the third requirement cannot be met. The third condition of the rule necessitates a showing that the party to be brought in by amendment must or should within the period of time for commencing the action against it have known that but for a mistake concerning the identity of the proper party, the action would have been brought against it. There is not in this case, nor could there be, any allegation that the original naming of the ship (SS Severn River) as a defendant was a mistake within Rule 15(c)(2).

Admiralty has long recognized the "personality" of the ship as distinct from the owner, and has traditionally distinguished between actions in rem brought against a vessel itself, and proceedings in personam directed against a vessel's owner or charterer. The Supreme Court alluded to the difference between the two causes of action when it commented that it is "a long standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." Continental Grane v. Barge FBL-585, 364 U.S. 19, 22 (1960). This Court refuses to accept plaintiff's contention that there exists no difference between an in rem and an in personam cause of action. One not only may, but must, distinguish between in rem and in personam actions. Gilmore & Black, The Law of Admiralty 2d (1975) §§ 1-12, p. 37. Our own Circuit Court of Appeals has indicated that the distinction between in rem and in personam proceedings is "fundamental." The Chickie, 141 F.2d 80, 86 (3d Cir. 1944). The court noted that an action in rem directs a plaintiff's claim to a thing, the vessel itself. A successful judgment in an in rem action was said to affect persons, but only with respect to "their interest in the thing which is personified as a defendant in the litigation." Id.

An action in rem may be initiated concurrently with or as an alternative to a proceeding in personam. If as in Continental Grain, supra, an admiralty libel has been brought against a vessel in rem and an in personam libel has been instituted against the vessel owner, the practical effect is the bringing of a single civil action with two inseperable parts against the vessel owner. Construction Aggregates Corp. v. S.S. Azalea City, 399 F. Supp. 662 (D. N.J. 1975).

Here, however, plaintiff initially instituted suit in rem agaisnt the SS Severn River and now, 15 years later, seeks to bring the claim aginast International Navigation Corporation in personam. Although it is true, as plaintiff urges, that the courts have consistently held that instituting or filing suit constitutes the bringing of suit within one year as required by the Carriage of Goods by Sea Act, 46 U.S.C. §1303(6), irrespective of the time when process is issued, United Nations Relief and R. Adm. v. The Mormacmail, 99 F. Supp. 552, 554 (S.D. N.Y. 1951); Ore Steamship Corp. v. D/S/A/S Hassel, 137 F.2d 326, 329 (2d Cir. 1943); Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 516 (4th Cir. 1954), the cases so stating involve factual circumstances easily distinguished from those in the instant action. The Fourth Circuit Court of Appeals stated in Internatio-Rotterdam, supra, that the filing of suit in admiralty begins the litigation as far as the statute of limitation is concerned. Suit therein was commenced by the filing of a libel in rem and a libel in personam. Internatio-Rotterdam, Inc. v. the Karachi, 122 F. Supp. 37 (D. Md. 1954). The Circuit Court made no determination whether commencement of a suit in rem is the equivalent of commencement of suit within the meaning of Cogsa with respect to a later amendment changing the action into a proceeding in personam. The Carriage of Goods by Sea Act has not eroded the

long-standing admiralty tradition of distinguishing between an action in personam and one in rem. This Court finds, therefore, that based upon the factual circumstances presented the commencement of suit against a vessel in rem is not the commencement of suit within the Cogsa statute of limitations with respect to a later proposed amendment which aims to assert the same claim against the vessel's owner.

Plaintiff's claim against International Navigation Corporation as owner of the vessel is barred by the Cogsa one-year statute of limitation unless the proposed amendment is found to relate back to the date of filing of the original complaint. The facts of the instant suit indicate that the relief afforded by Fed. R. Civ. P. 15(c) is not available to plaintiff Zack Metal Co. Plaintiff has failed to safisfy the second and third requirements of Rule 15(c), and the motion to amend the complaint is therefore denied.

As previously indicated, resoluiton of the issue of an amendment to plaintiff's complaint is dispositive of the question of restoration. Plaintiff's motion for an order vacating the Court's March 24, 1965, order of dismissal is therefore denied. Counsel shall submit an order in conformity with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1544

M. W. ZACK METAL COMPANY

Appellant

v.

INTERNATIONAL NAVIGATION CORPORATION

Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Judge.

Argued December 5, 1974 Decided March 10, 1975.

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and THOMSEN, Senior District Judge.

Anthony B. Cataldo (Jett, Berkley, Furr and Heilig on brief) for Appellant; John W. Winston (Seawell, McCoy, Winston and Dalton on brief) for Appellee.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

M.W. ZACK METAL COMPANY :

v. : No. 74-1544

INTERNATIONAL NAVIGATION CORPORATION :

- O R D E R -

Upon consideration of the Petition for Rehearing, it is now ORDERED:

(1) that the opinion be modified to conform to the copy attached to this Order, and

(2) that the Petition be and it hereby is denied.

With concurrences of Judges Haynsworth and Butzner.

Roszel C. Thomsen
Senior U. S. District Judg

March , 1975.

THOMSEN, Senior District Judge

M. W. Zack Metal Company (Zack) appeals from an order of the district court dismissing an action filed therein by Zack against International Navigation Corporation, a Liberian corporation (International). Zack had designated its action as an admiralty and maritime claim within the meaning of Rule 9(h), F. R. Civ. P., and caused the vessel Virtus, owned by International, to be attached.

International chartered its vessel Severn River to Contam Linie Hansen (the charterer), a German partnership, for a voyage in 1960 from Antwerp, Belgium, to New York. The charterer solicited cargo to be transported on board the Severn River and issued its bills of lading for such cargo signed by the vessel's master. Zack shipped with the charterer 93 coils of hot-rolled steel, for which a clean bill of lading was issued, but which were found to be damaged when they were discharged in New York.

In 1961 Zack instituted a suit in a court in Hamburg, Germany, where the charterer resided, against the charterer, the individual partners liable for the damage to Zack's steel and entered a money judgment for the full amount of the damage in favor of Zack against the charterer and its partners. Zack's claim against International was postponed for later decision.

In 1971 the German court rendered a further decision holding, according to the agreed translation, that "personal liability of the ship's owner does not exist", but that the "claims because of cargo damages are secured through a ship's creditor's right, even if - as in the present case - the carrier is not at the same time the ship's owner". The court entered a judgment that International "is convicted to

submit to execution being levies on the S. S. Severn River" of US$ 64,018.83, plus interest and part of Zack's expenses. The affidavits of German lawyers submitted by Zack and International respectively, as well as the agreed translation of the judgment itself, show that the judgment was essentially a judgment in rem against the Severn River. All of the parties, including Zack, appealed to a higher German court, which under the German practice may take additional testimony and review both the facts and the law.

In early 1972 Zack learned that another vessel owned by International, the Virtus, was to arrive at Norfolk. Although the appellate proceedings in Germany were and are still pending, Zack commenced the present suit against International in the Eastern District of Virginia, and caused an attachment to be issued against the Virtus. International appeared specially and moved to quash the attachment and dismiss the suit. The Virtus was released after International agreed to post security. After two hearings, the district court dismissed the suit, with a full opinion.

Zack has declared on the German judgment, which furnishes no basis for an in personam claim against the owner or for the attachment of the Virtus.

The judgment of the trial court in Hamburg is under review on appeal. It may be that the appellate court will impose some other liability upon the owner, but it is plain that the trial court limited the owner's liability to its interest in the Severn River. Essentially and substantively, it is an in rem judgment against the Severn River, imposing no in personam liability upon its owner, and furnishing no basis for the assertion of an in personam

liability of the owner or the attachment of any vessel owned by International. The attachment, of course, may not be based upon the speculative possibility that the reviewing court in Germany may give Zack greater rights against the owner than the trial court did.

The German judgment did not justify the suit in the Eastern District of Virginia or the attachment of the Virtus. The decision of the district judge dismissing that suit will be affirmed.

We have treated the cause of action being founded solely on the German judgment. Nothing we have done or said should be construed as intimating any opinion upon any cause of action Zack may have against any person, firm or corporation, including International, under the Carriage of Goods by Sea Act, 46 U.S.C. 1300 et seq.

Affirmed.